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"Determinate Plus" Sentencing (ESSB 6151)

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Certain sex offenders (RCW 9.94A.712(3)(4)(5)) are, effective September 1, 2001, to be sentenced to the maximum by the Court and to a minimum term within the appropriate SRA range. Release is to be decided by a Board hearing not less than 90 days before expiration of the Court set minimum term BUT AFTER the Board receives the results from Department of Corrections (DOC) End of Sentence Review and condition recommendations. Conditions of Community Custody are set by the Court and/or the Board (after considering recommendations of the DOC) and on an emergency basis (not to exceed 7 days without Board approval) by DOC.

If not released to community custody, a new minimum term, not to exceed two years, is set by the Board.

Those offenders released to community custody are under DOC supervision for the maximum term of the sentence. (Emphasis supplied in these statutory abstracts).

A NOTE ON TERMINOLOGY

The Board uses the term "Offender" as the broadest generic category and "Inmate" and "51" and "Parolee" as specific/particular designations.

When the Sentencing Reform Act (SRA) became effective in 1984, no post-incarceration transition/supervision was required.

Post-incarceration parts of a criminal sentence reflect, for the Board, specific discrete qualities and have not been matters under Board jurisdiction:

- (1) Community supervision was a 12-month period imposed by Courts between about 1986 and 1988 even though the term is also regularly used as a general process description.
- (2) Community placement is a 24-month period imposed by Courts between 1988 and the adoption of the Offender Accountability Act (OAA) in 2000.
- (3) Community custody will be the varying Sentencing Reform Act (SRA)-established periods imposed by sentencing Courts in connection with the OAA and is the modern term for post-incarceration parts of the sentence._ _

(4) The Board urges that "Parole" be the term used to continue to designate only those pre-1984 offenders (84's) remaining under its jurisdiction and that those coming under jurisdiction per ESSB 6151, be referred to as "51's" for clarity and ease of identification._

Note: All post incarceration parts of a criminal sentence are not parole.

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LISTED CRIMES

CRIMES NEWLY UNDER BOARD JURISDICTION, ESSB 6151 (RCW 9.94A, 9.95 as amended).....AN OFFENDER WHO IS NOT A PERSISTENT OFFENDER SHALL BE SENTENCED UNDER THIS SECTION.....RCW 9.94A.712(3) (Actual statutes should be consulted)

<u>CRIME</u>	<u>CLASS/SERIOUS LEVEL/MIN. RANGE</u>		<u>ELIGIBLE(i) "GOOD" TIME</u>	
Rape 1° (9A.44.040)	A	XII	93-123	15%
Rape 2° (9A.44.050)	A	XI	78-102	15%
Rape of Child 1° (9A.44.73)	A	XII	93-123	15%
Rape of Child 2° (9A.44.076)	A	XI	78-102	15%
Child Molestation 1° (9A.44.083)	A	X	51-68	15%
Indecent Liberties, With Force (9A.44.100(1)a,b,c)	A	VI	15-20	15%
Sex Predator Escape	A	X	51-68	15%

(ii) ANY BELOW WITH SEX MOTIVATION FINDING

Murder 1° (9A.32.030)	A	XV	240-320	15%
Murder 2° (9A.32.050)	A	XIV	123-330	15%
Homicide By Abuse (9A.32.055)	A	XV	240-320	15%
Kidnap 1° (9A.40.020)	A	X	51-68	15%
Kidnap 2° (9A.40.030)	A	V	6-12	15%
Assault 1° (9A.36.011)	A	XII	93-123	15%
Assault 2° (9A.36.021)	A	IV	3-9	15%
Assault of Child 1° (9A.36.120)	A	XII	93-123	15%
Burglary 1° (9A.52.020)	A	VII	15-20	15%

(Aggregate earned release "good time" for serious violent and class A sex crimes committed after July 1, 2003, may not exceed 10% of the sentence)

(iii) (a) ATTEMPT TO COMMIT ANY ABOVE

(b) HAS A PRIOR CONVICTION for an offense listed in RCW 9.94A.030(32)(b) and is convicted of any sex offense (emphasis supplied) which was committed after the effective date of this section.

NOTE: ALL SEX OFFENSES ARE NOT UNDER ISRB, E.G., STATUTORY RAPES, CHILD MOLESTATION 2°, INDECENT LIBERTIES, RAPE 3°, SEXUAL EXLOITATION, INCEST

UNLESS THERE IS A PRIOR CONVICTION, AS ABOVE. (STRIKE AND A HALF).

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NEW STATUTORY PROCESS (Effective September 1, 2001)

NEW RCW 9.95.420(3).... board shall conduct a hearing to determine whether it is more likely than not that the offender will engage in sex offenses if released on conditions..... board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions it is more likely than not that the offender will commit sex offenses if released..... (emphasis supplied in this abstract).

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ACTUARIAL RISK PREDICTION

There is no known set of personality characteristics that can differentiate the sexual abuser from the non-abuser and psychological profiles cannot be used to prove or disprove an individual's propensity to act in a sexually deviant manner. Association for the Treatment of Sexual Abusers Ethical Guidelines 1997.

The Board accepts that there is no present formula for the certain calculation of recidivism risk for anyone.

A number of studies and meta analyses, largely in Canada during the 1990's, have identified risk factors which statistically correlate with sexual re-offense. For example, Predicting Relapse: A meta-analysis of sexual offender recidivism studies, Hanson and Bussiere, JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, 1998, analyzed 61 databases broken into five sets of variables: (1) Demographic factors, (2) General criminality (non-sexual), (3) Sexual criminal history, (4) Sexual deviancy and (5) Clinical presentation and treatment history.

The average study follow-up period was five years though some were of twenty-five or thirty years. Sample size varied as did measures of what constituted recidivism, whether re-arrest, re-incarceration, parole violations, etc.

Risk factors are categorized as (A) static (historic, unchangeable) and (B) dynamic (prospective, presumably subject to influence and change). Dynamic factors have been further sub-categorized as stable such as marital status, deviant sexual preferences and personality disorders and acute e.g. anger, intoxication. Meta analysis does not require correlation between measures.

Measures of psychopathy were not included in the studies due to past lack of availability. This measure (see Hare's PCL-R) is apparently proving especially robust as a general risk assessment presently and scores of 30 and above seem to be associated with increased risk of sexual offending.

Significant risk factors identified by meta analysis include:

Phallometric response to children/rape (penile plethysmograph); Deviant sexual preference; prior sex offenses; prior treatment drop-out or ejection; any personality disorder; anti-social personality disorder; negative relationship with mother; stranger victim(s); all prior offenses; anger problems; youth; early onset of offending; unmarried; male child victim(s); unrelated victim(s) (non-stranger, non-blood); diverse sex crime history.

Some of the actuarial "instruments" developed from the foregoing include the RRASOR (Rapid Risk Assessment for Sex Offense Recidivism) (Hanson); the Static-99 (Hanson & Thornton , 2000) and MnSost-R (Minnesota Sex

Offender Screening Tool – Revised) (Epperson, Kaul & Hesselton, 1998).

These and similar “instruments” or tools constitute presumably objective actuarial evidence as distinct from various personality inventories like the MMPI and MCMI, clinical opinions and therapist’s assessments or service allocation tools, such as the LSI-R. General risk assessment tools like the VRAG have limited utility as predictors of sexual re-offense as well. Risk assessment per se is a developing art and the Board remains alert to research, noting especially the lack of current consensus that instrument scores can simply be accepted!

Maintenance of a forensic stance is especially important with sex offenders as the very skills which allow isolation of their prey and grooming of potential discoverers can seduce examiners and those in even a quasi-therapeutic relation into assuming a joint investment in “cure”. There is learned conjecture that most sex offenses are not even discovered, for example.

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SOME BEHAVIORAL CONSIDERATIONS

The general consensus that the re-offense interval can be several years means incapacitation or lack of access to the victim pool should not be confused with remission. A Board caveat is that sex offenders will reveal two things: (1) What is already known and (2) their rationalization for their behavior. The chronic sexual offender may be expected to learn a secret, focused life.

The foregoing is highly significant as the Board must have evidence if the presumption of release is to be properly, judicially considered, free of surmise.

The investigation and guilt determination phases must be excruciatingly and precisely detailed if later to be presented as evidence for determination of release/incarceration. Elements of proof for conviction are dealt with by the sentence and have less meaning in prediction.

Victim/survivor details of exactly what was said and done or demanded and precisely in what order are major evidence for the existence of paraphilias, sexual sadism and “rehearsal” behaviors. The offender’s work product or “painter’s painting” must be very clear and complete for analysis.

Whenever possible, prior criminal history must also be accurately detailed. For example as noted previously, youthful onset of offending is a predictor and teenage obscene phone calls handled at the time as petty nuisances may, with factual detail, be revealed as paraphiliac rehearsal. Earlier attacks on prostitutes handled as robberies or assaults or kidnappings may, in fact, have been humiliating sexually sadistic revelations of the offender’s true make-up.

The taking of “trophy” or “souvenirs”, taking photos, etc, are significant in analyzing an individual’s crime behavior for an estimation of risk of future sex offense. The Board’s charge to identify the chronic sex offender is exactly why the term excruciating detail is advised.

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CONDITIONS OF SUPERVISION

Conditions should serve first to protect the public and secondly guide supervision with clear expectations/responsibilities and, finally, enable an appropriate sanction grid from admonishment to re-imprisonment.

Conditions of supervision acceptable to the Board will include monitoring and control of access to the victim pool and this will mean an appropriate residence and occupation and possible geographic prohibitions even with the registration requirement. Whether an offender is deemed “Preferential” or “Situational” will determine to what degree substance avoidance is required as a condition. Some form of ongoing community-based treatment or group involvement is virtually mandated for this offender group. Regular polygraph and U/A testing and controlled access to internet and pornography outlets are appropriate conditions, in the Board’s view.

If supervision is to have meaning, timely intervention must be the objective.

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RELEASE DECISION

The charge of ESSB 6151 to identify and incapacitate the chronic sex offender is distinct from Washington 's parole system, regardless of surface similarities.

I. Facts and Details of Behavior

If the best measure of what a person will do is what he has done, the Board must have precise facts and details.

Detailing the attack will be uncomfortable for the investigator and painful for the victim/survivor. Excruciating is the deliberately chosen Board description of the necessary process.

The only one benefiting from avoidance and euphemism/generality is the offender. Precision of language and description are absolutely imperative if the Board is to appraise behavior as an objective manifestation of the offender's psyche. For example, the often confused use of "pedophilia" and "child molestation"; one is a diagnosis and one is an act and they are not synonymous. Offenders may be expected to reshape the interview and attempt to alter accepted perceptions.

Similarly the almost stereotypical: Mom's new boyfriend "fondling" the victim/daughter (son) as the two lay on the sofa watching TV. Is the attack "situational" or "preferential"? Only details of what was actually said and done in what order and over what period will provide any sort of basis for estimating future behavior as distinct from imposing a "proportional, equal, just" sentence for the act. Substance abuse is not a mitigator but may contribute to a "situational" analysis.

The Board suggests that prosecutors are uniquely positioned to signal the inception of a "51" at plea or verdict and provide an expanded detail in the pre-sentence packet, recognizing the distinctions between sentencing considerations and the future release decision.

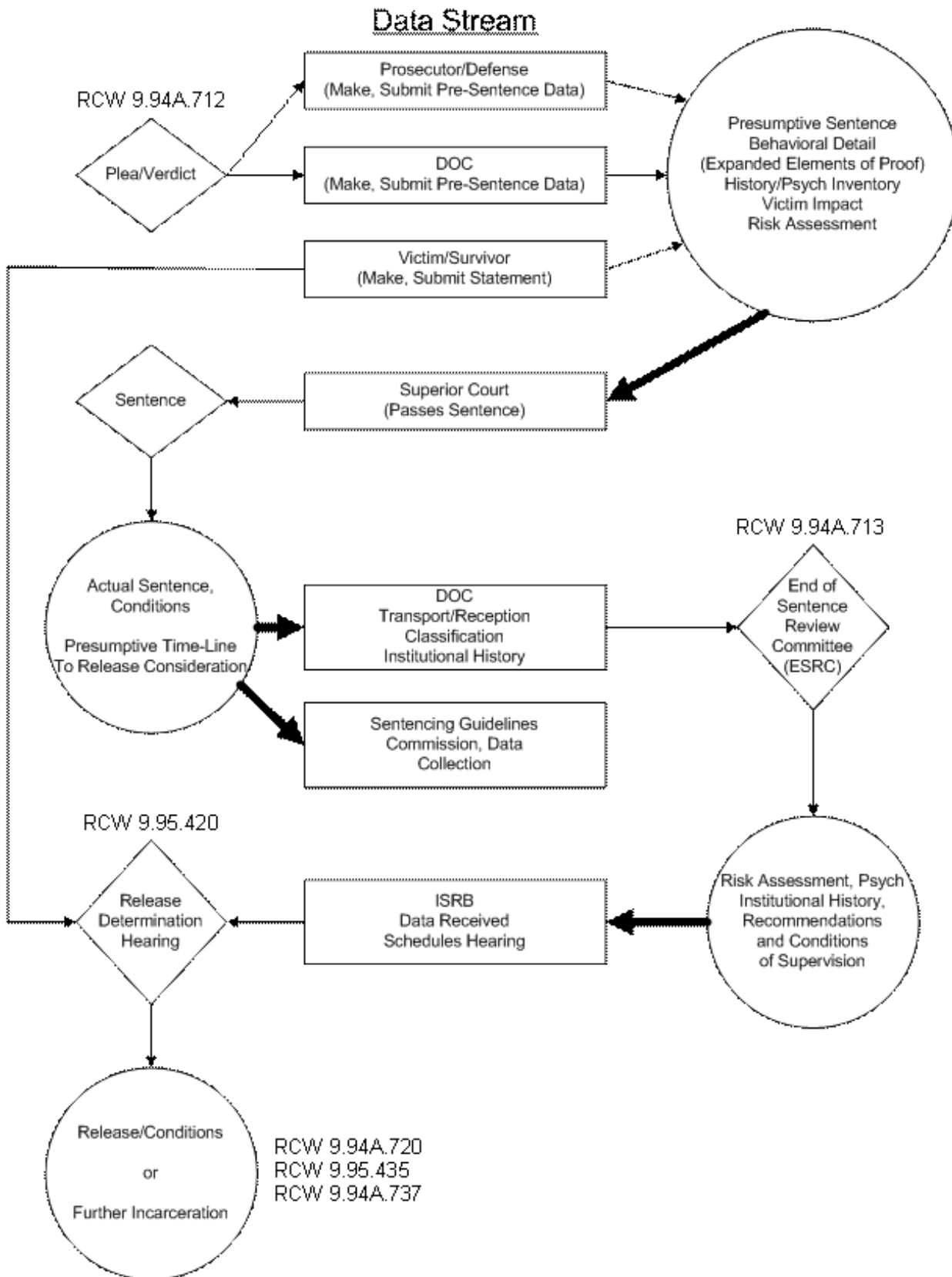
The speed with which some especially short sentences will require Board action lends some urgency to this suggestion as well as the companion need to provide victim/survivors with proper opportunities to offer statements both at sentencing and at release decision. Prosecutor's victim assistance groups can also develop detail which can be addressed by the offender and confirmed at sentencing.

Previous offense detail, as noted above, is also significant to the Board so a factual analysis of behavior can be performed.

II. Personal History, Psychological Profile

The Board accepts the imprecision of the psychological process as well as its historic tension with the needs of the law.

Clinical assessment, including IQ, history and personality inventories and, especially, appropriate actuarial assessments are valuable to the Board when combined with other referenced data. (The foregoing are not criteria but intended to illustrate the process).



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RELEASE TO COMMUNITY CUSTODY AND SUPERVISION

NOMENCLATURE

Regardless of surface similarities, the administration of the Sex Offender Management Act (SOMA), RCW 9.94A.712 is distinct from Washington 's parole system. Initially the Board distinguished the two systems by referring to the pre-July, 1984, offenders remaining under jurisdiction as "84s" and the sex offenders coming under jurisdiction after September 1, 2001, (per ESSB 6151) as "51s". "CCB" (Community Custody Board) will probably become the popular choice.

BOARD GRANT OF RELEASE TO COMMUNITY CUSTODY

....Release is to be decided by a Board hearing not less than 90 days before expiration of the Court-set minimum term BUT AFTER the Board receives the results from the Department of Corrections (DOC) End of Sentence Review and condition recommendations....(emphasis supplied in this abstract, see RCW 9.94A.713(1); 9.95.420(3)(a) and "data stream").

Reception of "short" (18 month or less) sentences

When a minimum term set by the Court has expired or will expire within 120 days of the sentencing hearing, DOC shall conduct its evaluation and End of Sentence Review (ESR) and recommendation(s) within 90 days of the offender's arrival at a DOC facility. No later than 120 days after the offender's arrival at DOC BUT AFTER the Board receives the results of ESR, the Board shall review for release determination (emphasis supplied in this abstract). RCW 9.95.011(2)(b), (3); RCW 9.95.420(1)(c).

Stage I

".420" (RCW 9.95.420) hearings in the institutions (see " Board Institutional Hearings", will determine release and follow the receipt of the ESR report. Denial of release and setting an additional term of up to 24 months must be based upon a finding by a preponderance of evidence that the inmate is more likely than not to commit sex offenses if released on conditions. (RCW 9.95.420(3); emphasis supplied in this abstract).

Distinguish

"Parole" is a privilege based upon Board opinion of rehabilitation and fitness for release and the Board is charged not to release on parole unless of such an opinion. RCW 9.95.100.

CCB release to Community Custody is presumed unless the Board makes an evidentiary based finding against such release. RCW 9.95.420(3).

Board Decision (Sample)

"The full Board does not find a preponderance of available evidence that Mr. Inmate is more likely than not to commit a sex offense.

Mr. Inmate will be granted an Order of Release to Community Custody upon providing an approved residence and release plan. Supervision is to be for Life, the duration of the sentence. All release conditions on W County cause # Judgement and Sentence for Assault Second Degree with sexual motivation are re-affirmed with other conditions the Board may order from time to time."

As with ".100" (RCW 9.95.100) hearings for parole, the Board will schedule ".420" (RCW 9.95.420) hearings about 120 days prior to the presumptive release date to allow for processing, investigation and approval. The Board Decision should trigger DOC preparation of a release plan and especially, an approvable residence.

Note

"Good time" for a potential parolee ("84") is 1/3 of the last set minimum term. For potential Community Custody releases "good time" may be either 1/3 or 15%, depending on the particular crime. Refusal of release for 24 months therefore means either 16 months or 20.4 months until the next presumptive release date for a Community Custodee. Aggregate earned release time ("good time") for one convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 2003 , may not exceed 10% of the sentence.

Stage II

Upon receipt of an acceptable release plan, recommended conditions and an approvable residence, the Board will issue an "Order of Release to Community Custody and Supervision Conditions".

REGULAR MANAGEMENT

As with parole supervision, routine contacts and verifications during supervision are carefully noted on the chronological screen (chronos) by the Community Corrections Officer (CCO) to facilitate any necessary Board interventions.

The flexibility of being able to modify conditions at any time, as circumstances warrant, is similar to the addendum process for parolees.

A CCO may set additional conditions at anytime and they will be effective for seven days as an emergency measure. RCW 9.94A.713(7). Board approval will make additional conditions effective at anytime for the entire period of supervision, unless rescinded by the Board. Court-set conditions may only be modified by the Court.

The period of CCB supervision is for the entire duration of the maximum sentence and this is distinct from the 36 months of parole supervision for "84s" or the varying periods of community custody for offenders not sentenced under RCW 9.94A.712.

VIOLATION RESPONSE

Arrest should be a last resort, BUT, when necessary there must be no delay and the CCO is responsible for a prompt decision and action. Public safety considerations must drive the decision.

The seriousness of arrest should be clear from the Board's intention that CCB arrestees be held in DOC facilities reasonably near the site of their alleged violation. Local jail crowding is a secondary factor.

Board Warning

As with parole, first resort for "technical" violations is a Board warning. These will usually be written upon the recommendation of the CCO but may also be scheduled for in-person admonitions or out-of-custody revocation hearings.

Stipulated Agreements

The Board favors these "field" resolutions of violation behavior where appropriate and relies upon the CCO's judgement. Prompt Board review of the proposal and formal approval is mandatory.

Suspension and Arrest

Suspension of community custody release and arrest must be prompt for "substantive" violations that endanger public safety or violate law. CCBs are subject to registration requirements and non-compliance is an independent felony, for example. Law enforcement should be promptly notified of crime behavior.

Within 48 hours of receipt of a Community Custody violation allegation, the Board will make:

- (1) A determination of whether "probable cause" exists to proceed with a violation hearing and
- (2) If probable cause does exist, is the violation sufficiently substantive that, if proven, the supervisee faces the probability of revocation and return to the institution? (A new minimum term is not governed by the 24 month limitation at a .420 hearing).

Probable revocation requires appointment of defense counsel, if indigency is demonstrated. Revocation cannot be a sanction unless the supervisee is represented by counsel or waives that right. RCW 9.95.435(4)(d).

Revocation hearing sites and scheduling are the same as for parole "on-sites". The Board may establish conditions of release pending the hearing. A Board member or designee will conduct the hearing.

CONDUCT OF COMMUNITY CUSTODY, BOARD (CCB) REVOCATION HEARING

Litany (Sample)

"Good morning Mr/Ms Custodee, my name is member/designee and I will be conducting this mornings Community Custody Revocation hearing. This is a microphone on the table between us and the tape recording will be kept for about six months. If you want a copy during that period, make a written request of the Board and send a blank 90 minute tape and a copy will be provided.

This is a two stage proceeding and you will have the right to appeal within seven days to the full Board. You have the right to remain silent. (and because a sanction you face, if guilty, is return to prison, you have the right to an attorney).

First I will hear your plea(s) and any evidence to determine whether you are guilty of one or more of the violations alleged. If you are, the second stage is to consider the disposition which will be decided in the next few days. Unless you (or your attorney) need more time or an appropriate disposition will take longer to arrange, you are entitled to a disposition decision within 10 days.

I will decide guilt or not at this mornings hearing by a preponderance of evidence and will consider hearsay but will not convict you on the basis of uncorroborated hearsay.

When you and the CCO are sworn (if you wish to testify) I will ask the CCO to read each violation and ask you to make one of three pleas to each: Not Guilty, Guilty or Guilty with Explanation. If you elect to remain silent, Not Guilty pleas will be entered for you.

Based upon the plea(s) evidence may be presented or the CCO will be asked to summarize for the record".

PROCEDURE

Absent questions by the suspended supervisee or preliminary matters by counsel, witnesses will be sworn, plea(s) taken and violation(s) either summarized or proof presented and cross-examined by counsel. The member may have questions as well.

Budget constraints mean that an Assistant Attorney General (ATG) will not usually be present to help the CCO present their case and the member will not do it for them.

If guilt of one or more of the violations is determined, the CCO will be asked to make a disposition recommendation and state its basis. Counsel will be invited to make a recommendation and the member may inquire further.

In the event of revocation, a new minimum term will be set leading to a future ".420" hearing. If reinstated, any new conditions will be added.

APPEAL

Within seven days after the decision in a community custody board revocation hearing, the offender may appeal the decision to a panel of three reviewing examiners designated by the Chair of the Board or by the Chair's designee. (RCW 9.95.435(4)(c); emphasis supplied in this abstract).

The Board anticipates that any revocation and new minimum term will be reviewed virtually automatically by Board members and designee(s) not involved in the actual hearing.

JLA:rls 9/4/03

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